

STATE OF MICHIGAN
COURT OF APPEALS

ROSLYN M. BROCK, Personal Representative of
the ESTATE OF RANDALL E. BROCK, Deceased,

UNPUBLISHED
February 4, 2000

Plaintiff-Appellant,

v

No. 208260
Calhoun Circuit Court
LC No. 96-003223-NH

BATTLE CREEK HEALTH SYSTEM,

Defendant-Appellee,

and

R.M. TEHRANI, M.D., and CRITICAL CARE
MEDICINE, P.C.,

Defendants.

Before: Fitzgerald, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(10)¹ in favor of defendant Battle Creek Health System in this wrongful death medical malpractice case.² We affirm.

Randall Brock, plaintiff's decedent, experienced pain and swelling in his left leg. Brock served on defendant hospital's Board of Directors. Because his family physician was unavailable, Brock telephoned Kay Taylor, an administrator at the hospital who was also Brock's friend, and asked her whether she knew of any orthopedic physicians in Battle Creek. Taylor gave Brock the names of two doctors. Of these two, Brock chose to make an appointment with Dr. William Comai, with whom he was also acquainted.

Dr. Comai, who is not an employee of defendant hospital, examined Brock in his own office. Upon discovering an abscess in Brock's leg, Dr. Comai immediately admitted Brock to defendant hospital, where Dr. Comai performed an operation to incise the abscess and drain it. While Brock was

recuperating in the hospital, Dr. Comai contacted Dr. Reza Tehrani, an internal medicine specialist who also is not defendant's employee, to assist him in treating Brock. Dr. Comai introduced Brock to Dr. Tehrani in the hospital and, thereafter, Drs. Comai and Tehrani jointly treated Brock while he was in the hospital. Upon his release, Brock was instructed to notify a doctor if he experienced shortness of breath, because this could indicate the presence of blood clots in his lungs, a possible result of his leg operation.

On September 6, 1995, Brock called Dr. Comai at his office and told him he was experiencing shortness of breath. Dr. Comai instructed Brock to go directly to the emergency room at defendant hospital and see either Dr. Tehrani or someone in his internal medicine group. Dr. Comai paged Dr. Tehrani at the hospital and told him Brock was coming to the emergency room because he was short of breath. In turn, Dr. Tehrani notified the emergency room secretary to prepare for Brock's arrival. When Brock arrived, Dr. Tehrani examined him for approximately twenty to thirty minutes. Dr. Tehrani concluded that Brock was merely out of shape and mildly obese. Approximately four days later, Brock died as the result of a pulmonary embolism caused by blood clots that had formed in his lungs.

Plaintiff alleged that Dr. Tehrani acted as an agent of defendant hospital and was negligent in failing to diagnose and treat Brock's pulmonary embolism. The trial court granted defendant's motion for summary disposition on the basis that plaintiff failed to establish triable issues as to whether Drs. Comai and Tehrani were acting as defendant's ostensible agents when they treated Brock. Plaintiff challenges this decision on appeal.

Pursuant to the theory of ostensible agency, a hospital can be held vicariously liable for the negligent acts of a physician who is not employed by the hospital and only uses the hospital as a situs to provide treatment to his or her patient. In *Grewe v Mt Clemens General Hospital*, 404 Mich 240, 250-251; 273 NW2d 429 (1978), the Supreme Court explained:

Generally speaking, a hospital is not vicariously liable for the negligence of a physician who is an independent contractor and merely uses the hospital's facilities to render treatment to his patients. See Anno: *Hospital-Liability-Neglect of Doctor*, 69 ALR2d 305, 315-316. However, if the individual looked to the hospital to provide him with medical treatment and there has been a representation by the hospital that medical treatment would be afforded by physicians working therein, an agency by estoppel can be found. See *Howard v Park*, 37 Mich App 496; 195 NW2d 39 (1972), *lv den* 387 Mich 782 (1972). See also *Schagrin v Wilmington Medical Center, Inc*, 304 A2d 61 (Del Super Ct, 1973).

In our view, the critical question is whether the plaintiff, at the time of his admission to the hospital, was looking to the hospital for treatment of his physical ailments or merely viewed the hospital as the situs where his physician would treat him for his problems. A relevant factor in this determination involves resolution of the question of whether the hospital provided the plaintiff with [the doctor] or whether the plaintiff and [the doctor] had a patient-physician relationship independent of the hospital setting.

To establish an ostensible agency, a plaintiff must show: (1) that the person dealing with the agent did so with belief in the agent's authority and this belief was a reasonable one; (2) that some act or neglect on the part of the principal sought to be charged generated that belief; and (3) that the person relying on the agent's authority was not negligent. *Chapa v St Mary's Hospital of Saginaw*, 192 Mich App 29, 33-34; 480 NW2d 590 (1991).

Here, there is no evidence that either Dr. Tehrani or Dr. Comai were ever held out as physicians treating the decedent on behalf of the hospital. Contrary to plaintiff's argument, Dr. Comai was not a hospital-provided physician. The decedent's physician-patient relationship with Dr. Comai was established through Dr. Comai's orthopedic practice, independent of the hospital setting, despite the fact that the decedent was assisted in locating and contacting a local orthopedic practice by a friend who was one of the hospital's administrative officers. See, e.g., *Wilson v Stilwill*, 411 Mich 587, 609-610; 309 NW2d 898 (1981) (no agency by estoppel where patient had independent relationship with treating physician prior to hospital admission). Dr. Comai's subsequent use of the hospital as the situs for the decedent's treatment, whether performed by Dr. Comai himself, Dr. Tehrani, or another physician provided by Dr. Comai rather than the hospital itself, is insufficient to hold the hospital vicariously liable for alleged negligence in that treatment. *Grewe, supra* at 250-251.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

¹ Although defendant also moved for summary disposition pursuant to MCR 2.116(C)(8), which tests the sufficiency of the pleadings alone, the trial court considered all of the evidence submitted by the parties, thus clearly granting summary disposition on the basis of MCR 2.116(C)(10) alone.

² The court's November 20, 1997, order dismissed defendants R.M. Tehrani, M.D., and Critical Care Medicine, P.C., with prejudice. Those parties do not join in this appeal.